IDEAL CITY DEVELOPMENT SDN BHD

v.

DYNAMIC MOULD SDN BHD

COURT OF APPEAL, KUALA LUMPUR
MOHD SAARI YUSOFF JCA
PAJAN SINGH GILL JCA
RICHARD MALANJUM JCA
[CIVIL APPEAL NO: B-02-711-1999]
20 MAY 2003

CONTRACT: *Conditional contract - Sale and purchase of land - Sale contingent upon approval of Foreign Investment Committee - Failure to secure approval - Whether purchaser discharged from further performance - Whether entitled to return of deposit*

By a sale and purchase agreement dated 21 July 1997 ('the agreement), the plaintiff agreed to purchase a piece of industrial land from the defendant, and for the purpose paid a deposit of RM608,751. Having paid the deposit, the plaintiff entered a caveat against the land. *Inter alia*, the agreement stipulated that the plaintiff would pay the balance price by 20 January 1998 and in any case not later than two months thereafter, and further, that it was conditional upon an approval being granted by the Foreign Investment Committee ('FIC'), failing which the plaintiff could either extend time or terminate the Agreement and get a refund of all monies paid to the defendant.

The parties had only obtained a conditional approval from the FIC, and that being so, the plaintiff treated the Agreement as being frustrated and sought for a refund of the deposit. By letter dated 10 February 1998, however, the defendant informed the plaintiff that it had forfeited the deposit due to the plaintiff's failure to pay the balance price within the stipulated time.

Before the High Court, the plaintiff applied for and obtained summary judgment in respect of its claim for the return of the deposit. The learned judge however refused the defendant's application for summary judgment of its counterclaim. In this appeal by the defendant against the decisions, a question *inter alia* arose as to whether the plaintiff had been discharged from any further performance under the Agreement, and was hence entitled to a refund of the deposit.

Held:
Per Richard Malanjum JCA

[1] The requirement to obtain the approval from the FIC was a condition precedent and thus a contingent condition in the Agreement. (p 209 f)

[2] Since no approval was secured before the expiry of the three months period as stipulated in the Agreement, and since no extension of time was granted by the plaintiff thereof, the defendant must comply with the incidental obligations arising therefrom, including to refund any deposit paid. The defendant failed to do so with the result that the judgment entered by the court below is proper and appropriate. On this ground alone the appeal should be dismissed. (p 210 e-h)

[3] The defendant had written to the plaintiff on the forfeiture of the deposit even before the due date for the payment of the balance of the purchase price. That being so, the letter of 10 February 1998 served no purpose, since by that time the Agreement could no longer be performed due to the failure to obtain the approval from FIC. Even if it could be taken that the time to obtain the consent was still running, the letter of the defendant was premature and in breach of the term of the Agreement since the last date to pay the balance of the purchase price should have been 20 March 1998. (pp 211 g-h & 212 a)

[4] *Prima facie*, there was no reason for the defendant to have the caveat removed so long as the deposit remained unpaid. But once refunded it would be incumbent upon the plaintiff to remove the caveat promptly. (p 212 f)

[4a] There was no merit in the argument that the plaintiff's claim was monetary in nature and therefore had not given rise to any caveatable interest. Firstly, the caveat was lodged pursuant to a term in the Agreement. Further, since the defendant was contesting the various terms of the Agreement, it could not be heard to say that the claim was purely monetary. It was hence clear that there was a *bona fide* triable issue here. Conversely, if the defendant complied with the first decision by refunding the deposit, then, in such a case, there would be no longer any need for the caveat to remain and thus no issue to be tried. In the circumstances, the learned judge was right in dismissing the defendant's O. 14 application. (p 213 d-e)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes*

Melalui satu perjanjian jual beli bertarikh 21 Julai 1997 ('Perjanjian'), plaintif bersetuju untuk membeli sebidang tanah industri dari defendan dan untuk itu telah membayar deposit berjumlah RM608, 751. Setelah membayar deposit, plaintif memasukkan kaveat terhadap tanah tersebut. Antara lain, Perjanjian memperuntukkan bahawa plaintif akan melunaskan baki harga pembelian sebelum 20 Januari 1998 atau selewat-lewatnya dua bulan selepas itu, dan bahawa Perjanjian adalah tertakluk kepada kelulusan Jawatankuasa Pelaburan Asing ('FIC'), kegagalan mendapatkan mana membolehkan plaintif sama ada melanjutkan masa atau menamatkan Perjanjian dan seterusnya mendapatkan kembali segala wang yang telah dibayar kepada defendan.

FIC hanya memberi kebenaran bersyarat bagi penjualan tanah, dan atas sebab itu, plaintif menganggap Perjanjian sebagai terkecewa dan memohon supaya deposit dikembalikan. Namun begitu, melalui surat bertarikh 10 Februari 1998, defendan memberitahu plaintif bahawa ia telah merampas deposit oleh kerana plaintif gagal membayar baki harga belian dalam masa yang ditetapkan.

Di Mahkamah Tinggi, plaintif memohon dan memperoleh penghakiman terus berkaitan tuntutan bagi mendapatkan kembali depositnya. Hakim yang bijaksana bagaimanapun menolak permohonan defendan untuk mendapat penghakiman terus bagi tuntutan balasnya. Dalam rayuan oleh defendan di sini, persoalan antara lain telah berbangkit sama ada plaintif telah terlepas dari apa-apa tanggungan lanjut di bawah Perjanjian, dan dengan itu berhak kepada pengembalian deposit.

Diputuskan:
Oleh Richard Malanjum HMR

[1] Keperluan untuk mendapatkan kelulusan dari FIC adalah suatu syarat terdahulu dan oleh itu merupakan satu pra-syarat dalam Perjanjian.

[2] Oleh kerana kelulusan tidak diperolehi sebelum tempoh tiga bulan tamat seperti yang dikehendaki dalam Perjanjian, dan oleh kerana tiada perlanjutan masa telah diberikan oleh plaintif, maka defendan wajib mematuhi segala obligasi yang berbangkit, termasuk untuk mengembalikan deposit. Defenda gagal berbuat demikian menyebabkan penghakiman seperti yang diputuskan oleh mahkamah di bawah adalah betul dan teratur. Atas alasan ini sahaja rayuan sudah boleh ditolak.

[3] Defendan telah menulis kepada plaintif berhubung perampasan deposit walaupun tarikh untuk membayar baki harga belian masih belum berakhir. Oleh yang demikian, surat bertarikh 10 Februari 1998 tidak memberi apa-apa erti, oleh kerana Perjanjian di waktu itu sudah tidak lagi boleh disempurnakan berpunca dari kegagalan memperoleh kelulusan dari FIC. Jikapun masa untuk mendapatkan kebenaran boleh dianggap sebagai masih berjalan, surat defendan tersebut adalah pramatang dan melanggari terma Perjanjian oleh kerana tarikh terakhir untuk membayar baki harga belian sepatutnya adalah pada 20 Mac 1998.

[4] Secara *prima facie*, kaveat disini tidak boleh dibatalkan selagi deposit tidak dikembalikan oleh defendan. Sebaliknya, sebaik sahaja deposit dibayar, kaveat harus ditarik balik oleh plaintif dengan segera.

[4a] Hujah bahawa tuntutan plaintif bersifat kewangan dan tidak membangkitkan suatu kepentingan berkaveat adalah tidak bermerit. Pertama, kaveat dimasukkan berdasarkan terma dalam Perjanjian. Selain itu, defendan telah mencabar terma-terma Perjanjian, dan oleh sebab itu adalah tidak terbuka baginya untuk mengatakan bahawa tuntutan adalah semata-mata bersifat kewangan. Ianya jelas bahawa terdapat isu yang boleh dibicarakan di sini. Walaupun begitu, jika defendan mematuhi keputusan pertama dengan mengembalikan deposit, maka tiada lagi keperluan untuk kaveat terus diwujudkan, yang bermakna tidak lagi terdapat isu yang boleh dibicarakan. Oleh hal yang demikian, hakim yang bijaksana adalah betul apabila menolak permohonan A. 14 defendan.

Rayuan ditolak.]

Case(s) referred to:

Aberfoyle Plantations Ltd v. Khaw Bian Chend [1960] 2 MLJ 47 ***(refd)***

Gabriel Ngu Choo Kiong v. Julia Voon Jan Choo [1998] 1 AMR 69 HC ***(refd)***

Jaafar Ibrahim v. Gan Kim Hin [1985] 2 MLJ 24 ***(refd)***

Loo Choo Teng & Anor v. Cheok Swee Lee & Ors And Another Appeal [2000] 2 CLJ 389 CA ***(dist)***

National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC ***(foll)***

Tan Su Sing v. Haluan Kreatif Sdn Bhd [1998] 1 CLJ Supp 407 HC ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 32, O. 81

For the appellant/defendant - Ranjit Singh (CK Yeoh & Edward Soo); M/s Edward Soo & Co
For the respondent/plaintiff - Zabidi Mohamad; M/s Kong Kim Leng & Co

[Appeal from High Court, Shah Alam; Civil Case No: MT1-22-344-98]

Reported by WA Sharif

JUDGMENT

Richard Malanjum JCA:
Before us is an appeal by the appellant/defendant ('defendant') against two decisions of the learned judge in the court below.

The first decision ('the first decision') is in respect of the granting of summary judgment pursuant to O. 81 of the Rules of the High Court 1980 ('RHC') to the respondent/plaintiff ('plaintiff) for the refund of the sum of RM608,751 ('the deposit') being the deposit paid by the plaintiff as the purchaser to the defendant as the vendor in connection with the sale and purchase agreement dated 21 July 1997 ('the agreement') for a piece of an industrial land held under GM 443 Lot 1010 in the Mukim of Cheras in the district of Hulu Langat ('the said land').

The second decision ('the second decision') is in connection with the application by the defendant for summary judgment on its counterclaim under O. 14 of RHC to remove the caveat of the plaintiff lodged against the said land. Based on the preliminary objection of the plaintiff the learned judge dismissed the application.

The pertinent terms in the agreement are as follows:

(a) that by cl. 1(a)(i) the deposit represented 10% of the purchase price of the said land;

(b) that by cl. 1(a)(ii) the balance was to be paid to the defendant's solicitors as stakeholder within six months from the date of the agreement which was on or before 20 January 1998;

(c) that by cl. 1(b) the defendant expressly agreed to allow the plaintiff an automatic extension of two months to settle the balance of the purchase price;

(d) that by cl. 6, the defendant had the right to forfeit the deposit paid in the event of the plaintiff failing to observe cl. 1 of the agreement, that is, the payment of the balance of the purchase price;

(e) that by cl. 14 time was of the essence of the agreement;

(f) that cl. 16 of the agreement stipulated, *inter alia*,

(i) that it was conditional upon:

(a) the relevant consent/approval being obtained from the Foreign Investment Committee (FIC) for the sale of the said land within three months from the date of the agreement, that is, by 20 October 1997 – (sub-cl. 16(a)(i) and (b)); and

(b) the successful removal by the defendant of the private caveat of one Haji Mohd Shahir bin Haji Sanawi. And it was the obligation of the defendant to apply for the removal at its own costs within three months from the date of the agreement – (sub-cl. 16(a)(i) and (c));

(ii) that in the event of the consent/approval not obtained or rejected within the stipulated time through no fault of either party then the plaintiff had the option of either:

(1) to grant an extension of time for a duration it deemed fit; or

(2) to terminate the agreement in which event all monies paid to the defendant would have to be immediately refunded to the plaintiff free from any interest and the agreement would be deemed cancelled and of no effect – (sub-cl. 16 (d)).

(g) that by cl. 17 the defendant authorised and consented to a private caveat to be lodged by the plaintiff against the said land to prevent any further dealings affecting the same; and

(h) that by cl. 20 any notice, request or demand requiring to be served by either party to the other under the Agreement would have to be in writing and would be deemed to have been sufficiently served.

In order to comply with cl. 16 of the agreement, the steps taken were as follows:

(i) On 6 August 1997 the solicitors for the plaintiff applied to the FIC for the consent/approval on the sale of the said land;

(ii) The FIC replied to the application by a letter dated 17 October 1997 which was received by the plaintiff on 22 October 1997 after the expiry of the three months period stipulated in the agreement. In the said letter FIC attached a condition:

> ... FIC tiada halangan terhadap cadangan seperti di perenggan 1.1 tertaluk kepada syarat Dynamic Mould Sdn. Bhd. mengadakan sekurang-kurangnya 30% ekuiti Bumiputera sebelum 31.12.1998.

(iii) that despite the expiry of the period the solicitors for the plaintiff by way of appeal wrote a letter dated 27 October 1997 to FIC seeking for the condition to be waived; and

(iv) that by a letter dated 17 January 1998 and received by the solicitors for the plaintiff on 25 February 1998, FIC rejected the appeal and maintained the stipulated condition.

While the reply to the appeal from FIC was pending the solicitors for the plaintiff by a letter dated 2 January 1998 wrote to the solicitors for the defendant invoking cl. 16 of the agreement on the basis that FIC had refused to grant its consent/approval for the sale *vide* the letter dated 17 October 1997.

And by a letter dated 6 January 1998 the plaintiff wrote to the Estate Agent of the defendant, namely, namely Ng Chan Mao Co. seeking for 'an amicable consent to cancel the purchase deal' due to economic slowdown.

There was no reply received from the defendant to both the letters.

However by a letter dated 10 February 1998 the solicitors for the defendant wrote to the solicitors for the plaintiff informing the latter of the forfeiture of the deposit paid due to the failure on the part of the plaintiff to pay the balance of the purchase price within the time stipulated in the agreement.

Then by letter dated 25 February 1998 the solicitors for the plaintiff informed the solicitors for the defendant about the rejection by FIC of the appeal to waive the condition stipulated. The letter went on to state that the conditional approval given by the FIC did not amount to an approval and hence the agreement was frustrated.

In reply by a letter dated 25 February 1998 the solicitors for the defendant informed the solicitors for the plaintiff that the deposit had been forfeited since the plaintiff chose not to comply with the condition imposed by FIC.

Accordingly legal action was launched by the plaintiff to recover the deposit paid under the agreement.

In the first decision the learned judge in the court below held, *inter alia:*

(i) that since there was no approval obtained from FIC it meant that the contingent event became impossible to perform and thus the agreement became void and frustrated pursuant to cl. 16(d) thereof;

(ii) that notwithstanding the appeal to the FIC by the plaintiff for the condition imposed to be waived, that did not amount to the plaintiff abandoning sub-cls. 16(b) and (d) of the agreement and that if such was the intention of the plaintiff cl. 20 would have been complied with;

(iii) that the letter of the plaintiff to the Estate Agent of the defendant did not amount to an act of termination of the agreement by the plaintiff; and

(iv) that the defendant by its letter dated 10 February 1998 purporting to forfeit the deposit paid was in fundamental breach of the terms and conditions of the agreement since it was premature. With the automatic extension of two months the expiry period to pay the balance should have been 20 March 1998.

In the second decision the learned judge ruled that:

(i) that the defendant should have proceeded by way of O. 32 of RHC as there was a pending action in the form of its counterclaim. Alternatively it could have commenced a fresh proceeding by way of an originating summons;

(ii) that there were triable issues raised by the plaintiff in relation to the O. 14 application of the defendant;

(iii) that the application to remove the caveat was a claim in the nature of an un-liquidated damages and hence O. 14 application was unsuitable;

(iv) that to maintain the *status quo* between the parties the caveat of the plaintiff should stay in view of the refusal by the defendant to refund the deposit;

(v) that the action of the plaintiff had raised a serious question to be tried; and

(vi) on the balance of convenience it was desirable to maintain the caveat.

Before us the main complaints of the defendant in respect of the first decision were, *inter alia*:

(i) that the learned judge erred in concluding that the expiry date to pay the balance of the purchase price was eight months from the date of the agreement when in fact the additional two months should only come into play upon request by the plaintiff and in this case there was none. Hence the termination letter of the defendant dated 10 February 1998 was valid contrary to the finding of the learned judge;

(ii) that the learned judge erred in concluding that the agreement was void for the failure of the plaintiff to secure the consent/approval from FIC on the sale;

(iii) that the learned judge erred in not finding that the letter of the plaintiff dated 2 January 1998 effectively renounced the agreement. And that was further substantiated by its letter dated 6 January 1998 indicating its inability to finance the purchase. Thus the defendant was entitled to treat the conduct of the plaintiff as anticipatory breach and considered the agreement discharged;

(iv) that the learned judge erred in considering that the time to secure the consent/approval from FIC was crucial when it was irrelevant after the plaintiff appealed to have the stipulated condition waived by FIC. The act of appealing enlarged the time and cl. 16 should no longer be applicable;

(v) that the learned judge erred in not considering that the plaintiff demanded for the refund of the deposit even before the result of the appeal was known.

The requirement to obtain for the consent/approval from FIC was a condition precedent and thus a contingent condition in the agreement. This point has been succinctly expressed in *National Land Finance Co-Operative Society Ltd v. Sharidal Sdn. Bhd.* [1983] 2 CLJ 76; ([1983] CLJ (Rep) 282) where Salleh Abas CJ (Malaya) (as he then was), when delivering the judgment of the Federal Court said at p. 80 (p. 289):

> It is therefore obvious that the parties have entered into a contract of sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, nor guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. It is, however, a condition which is known in the law of contract as a contingent condition, the effect of which is that a contract

shall not take effect unless and until the condition is fulfilled (see *Trans Trust SPRL v. Danubian Trading Co Ltd* [1952] 2 KB 297 at p. 304 – per Denning LJ – and *Property and Bloodstock Ltd v. Emerton; Bush v. Property and Bloodstock Ltd* [1967] 3 All ER 321 at p. 330 – per Sachs LJ). Until the FIC approval was given liability for further performance remained unenforceable, ie suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled.

It is to be noted that in the present case the wordings in cl. 16(a)(i) of the agreement read as follows:

(a) This Agreement is conditional upon:

(i) the relevant consent/approval being obtained from the Foreign Investment Committee for the sale of the said Property; ...

The language of the provision is couched in the affirmative unlike in the case of *Loo Choo Teng & Anor v. Cheok Swee Lee & Ors and Another Appeal* [2000] 2 CLJ 389 where the words used in cl. 5 of the sale and purchase agreement were constructed by this court to be in negative terms.

(See also: *Aberfoyle Plantations Ltd v. Khaw Bian Chend* [1960] 2 MLJ 47).

We have therefore no reason to disagree with the conclusion of the learned judge in the court below on this issue. Thus it is no longer available to the defendant to say that in fact and in law such consent/approval is not required since the plaintiff is a local company. And in this case it is not in dispute and indeed a fact that no consent/approval was secured before the expiry of the three months period as stipulated in the agreement. There is also no evidence adduced to show that the plaintiff has granted or agreed to any extension of the stipulated period in cl. 16. Hence such failure should trigger the application of cl. 16(d) of the agreement and for the defendant to comply with the incidental obligations thereof including the refund of any deposit paid. Having failed to do so, the judgment entered against the defendant by the court below is therefore proper and appropriate in the circumstances. On this ground alone we find this appeal to be without merit and should be dismissed.

However for the sake of completeness we should consider the other argument advanced by learned counsel for the defendant in his attempt to show that the condition precedent was no longer available to the plaintiff. It was submitted that the appeal to FIC had nullified the mandatory effect of cl. 16(d) and set the time at large.

With respect we are not convinced. In our view the cut off point is the three months requirement under cl. 16(b) of the agreement unless extension is given under (d) thereof. Further cl. 14 provides time being of the essence. Therefore any act of the plaintiff after the expiry period should not be taken to its prejudice. If it were otherwise then cl. 14 and sub-cl. (d) of cl. 16 would have been quite unnecessary. (See: *Jaafar bin Ibrahim v. Gan Kim Hin* [1985] 2 MLJ 24; *National Land Finance Co-Operative Society Ltd v. Sharidal Sdn Bhd (supra).*

It was also the submission of learned counsel for the defendant that the letter of FIC dated 17 October 1997 was an approval. With respect we are of the view that the conclusion of the learned judge in the court below is correct. The said letter has a condition attached and hence it is a conditional approval which does not meet the requirement of cl. 16(d) of the agreement. Thus, the reference by the learned judge to the case of *National Land Finance Co-Operative Society Ltd. v. Sharidal Sdn. Bhd. (supra)* is appropriate in dealing with this point. At any rate the letter itself came after the expiry of the period stipulated in the agreement and thus rendered useless.

For the above reasons we do not think there is any merit to the contention of learned counsel for the defendant that it was the plaintiff that terminated the agreement before the outcome of the appeal was known. Firstly there was no unconditional consent/approval obtained from FIC within the stipulated period in the agreement. Thus, the question of termination on the part of the plaintiff became quite irrelevant. The letters to the Estate Agent of the defendant dated 6 January 1998 and to the solicitors for the defendant dated 2 January 1998 respectively were superfluous since the condition precedent in the agreement could no longer be performed as the period had lapsed. We agree therefore with the conclusion of the learned judge that the said letters do not amount to termination of the agreement.

Meanwhile on the part of the defendant it had written to the plaintiff on the forfeiture of the deposit even before the due date for the payment of the balance of the purchase price. It was the contention of learned counsel for the defendant that the two months automatic extension as provided in cl. 1(b) of the agreement should be applied for by the plaintiff and since it failed to do so the last date to pay the balance was 20 January 1998. With respect we cannot accede to that argument. There is nothing in the said clause that demands such an interpretation. Accordingly the letter of the solicitors for the defendant dated 10 February 1998 served no purpose since by that time the agreement could no longer be performed due to the

failure to obtain the consent/approval from FIC. And even if it could be taken that the time to obtain the consent/approval was still running, the letter of the defendant was premature and in breach of the term of the agreement since the last date to pay the balance of the purchase price should have been 20 March 1998.

Incidentally, in its letters to the plaintiff, the defendant did not indicate that the second condition – precedent in cl. 16(a) of the agreement had been complied with. However, since the parties did not touch on this issue, we would not dwell further into it.

Accordingly the learned judge was right in granting the relief prayed for by the plaintiff and we therefore dismiss the appeal against the first decision.

We now deal with the complaint on the second decision.

It is the contention of learned counsel for the defendant that the application for summary judgment under O. 14 of RHC should have been granted by the learned judge instead of upholding the preliminary objections of the plaintiff.

Now, the defendant prayed for the private caveat of the plaintiff to be removed from the title deed of the said land. Thus to consider the issue it is pertinent to note that the caveat was lodged pursuant to cl. 17 of the agreement. The purpose was to protect the interest of the plaintiff after the payment of the deposit. And it should have been understood that once the deposit returned to the plaintiff the caveat should be removed without the need for the defendant to make any formal application. However, in this case since the deposit is yet to be refunded the purpose of the caveat remains. *Prima facie* therefore there is no reason at all for the defendant to have the caveat removed so long as the deposit remains unpaid. But once refunded it would be incumbent upon the plaintiff to remove the caveat promptly.

But it is the rejection by the learned judge of the application in limine that upsets the defendant. We have therefore examined the reasons of the learned judge.

In upholding the objection the case of *Gabriel Ngu Choo Kiong v. Julia Voon Jan Choo* [1998] 1 AMR 69 was referred to as the authority for holding that to remove a private caveat a formal application by way of an originating summons must be adhered to. However where there is a pending proceeding then O. 32 of RHC should be a proper Order to comply with.

Learned counsel for the defendant submitted that since there is a pending suit in this case in the form of a counter claim of the defendant there is no necessity for the defendant to go by originating summons to have the private caveat of the plaintiff removed. And it is further submitted that even if O. 32 has not been complied with the plaintiff has not been prejudiced by the use of O. 14. Learned counsel is also emphatic that the plaintiff has no caveatable interest since the claim of the plaintiff is only for the return of the deposit – a monetary claim.

We have considered the points raised and we are in agreement that there is no necessity for an originating summons to be filed to remove the private caveat of the plaintiff since there is a pending matter in the nature of a counter claim. We are of the view that O. 32 of RHC would be more appropriate to rely upon as was suggested in the case of *Tan Su Sing v. Haluan Kreatif Sdn. Bhd.* [1998] 1 CLJ Supp. 407. Moreover it cannot be said that the claim of the plaintiff is only monetary in nature and hence it has no caveatable interest in respect of the said land. In the first place the caveat was lodged pursuant to a term in the agreement. And if the defendant is now contesting the various terms of the agreement it should not be heard to say that the claim is purely monetary. On this ground we are satisfied that there is a *bona fide* triable issue. Conversely if the defendant complies with the first decision by refunding the deposit then it would then be correct to say that in such a case there would no longer be any need for the caveat to remain and thus no issue to be tried.

For the foregoing reasons we agree with the learned judge in dismissing the O. 14 application of the defendant. It is justified and correct in law and we affirm the second decision accordingly.

We do not think the other points raised by the learned counsel for the defendant and not specifically dealt with herein are of any significance as to warrant us to decide otherwise. Hence the appeal is dismissed with costs to be taxed and paid to the plaintiff. Deposit paid to account for taxed costs.